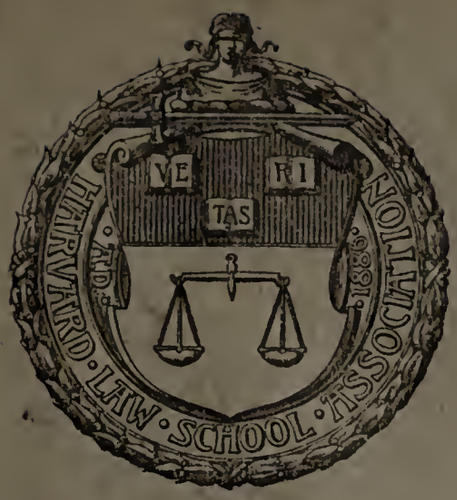

TWO ADDRESSES

DELIVERED BEFORE THE ALUMNI OF THE

HARVARD LAW SCHOOL

AT CAMBRIDGE, JUNE 21, 1920

INTRODUCTORY STATEMENT

PUBLISHED BY THE

HARVARD LAW SCHOOL ASSOCIATION

"THE OBJECTS OF THIS ASSOCIATION SHALL BE TO ADVANCE THE CAUSE OF LEGAL EDUCATION, TO PROMOTE THE INTERESTS AND INCREASE THE USEFULNESS OF THE HARVARD LAW SCHOOL, AND TO PROMOTE MUTUAL ACQUAINTANCE AND GOOD FELLOWSHIP AMONG ALL MEMBERS OF THE ASSOCIATION."

Court Square Press :-: Boston

INTRODUCTORY STATEMENT

THE reunion of the former students of the Harvard Law School to celebrate the beginning of the second century of the school and the fiftieth anniversary of the beginning of Dean Langdell's work was held in Cambridge on Monday, June 21, 1920. The addresses by Dean Pound and Judge Hughes which are printed in this pamphlet were delivered on that occasion. As many requests have been received for copies of these addresses, and in order to commemorate the occasion, the Harvard Law School Association has published them, and sends a copy to every member of the Association. Applications for additional copies while the supply lasts should be made to

F. W. GRINNELL, *Secretary*
Harvard Law School Association,
60 State Street, Boston, Mass.

THE LAW SCHOOL AND THE COMMON LAW

ADDRESS OF DEAN POUND

"A history of civilization would be miserably imperfect," says Maitland, "if it took no account of the first new birth of Roman law in the Bologna of Irnerius." "Indeed," he adds, "there are those who think that no later movement—not the Renaissance, not the Reformation—draws a stronger line across the annals of mankind than that which is drawn about the year 1100 when a human science won a place beside theology." Social control through law is a condition of civilization, and a developed legal order is one of the highest products of civilization. But if, for these reasons, the event which determined that the Roman law should be the basis of the legal institutions of half of the world of today is significant for the history of civilization, that history may not ignore the two events which determined a divided legal allegiance for modern peoples and insured that the common law of England should be a rival law of the world. Those events were persistence of medieval English law into the seventeenth century through the influence of law teaching in the Inns of Court, and reception of seventeenth-century English law as the law of the English-speaking new world, and the development and making over thereof in the courts of that new world, even as the Roman law was developed and made over in the continental universities. Maitland has told us how taught law was the controlling factor in preventing a reception of Roman law in sixteenth-century England. Taught law was no less a controlling factor

in insuring the reception of the common law as the law of America. In truth that reception was in no small part the work of Joseph Story as Dane Professor at Harvard.

Nowadays it is difficult to realize how easily the result might have been otherwise, for because of the undivided allegiance of English-speaking peoples to the law of Westminster Hall, the outstanding phenomenon of the law of today is the persistence and the vitality of the common law. It maintains its unity despite the political divisions of the English peoples. In the United States it preserves that unity despite the uncurbed power of laying down a local common law which resides in the highest courts of each of our forty-eight states. It survives the huge mass of legislation which is annually put upon our statute books and gives it form and consistency. Nor is it less persistent in competition with law of foreign origin. Of the states carved from the Louisiana purchase, Louisiana alone preserves the French law. In Texas only a few anomalies in procedure serve to remind us that another system once prevailed in that domain. Only historians know that the custom of Paris was once law in Michigan and Wisconsin. And in Louisiana, not only is the criminal law wholly English, but the fundamental common-law doctrines, supremacy of law, judicial precedents and contentious procedure, have imposed themselves on a French code and have made great portions of the law Anglo-American in all but name. There are many signs that the common law is imposing itself gradually in like manner upon the French law in Quebec. In everything but terminology it has all but overcome a received Roman law in Scotland. The established Roman-Dutch law in South Africa is slowly giving way before it as the judges more and more reason in a Romanized terminology after the manner of common-law lawyers. In the Philippines and in Porto Rico there are many signs that common-law administration of a Romanist code will result in a system Anglo-American in substance, if Roman-Spanish in its terms. Again, the American development of the common-law doctrine of supremacy of law, in our characteristic institution of judicial power with respect to legislation, however much assailed at home, is commending itself to peoples who have to administer written constitutions. In the reports of South American repub-

lics we find judicial discussions of constitutional problems fortified by citations of American authorities. In the South African reports we find a court composed of Dutch judges, trained in the Roman-Dutch law, holding a legislative act invalid and citing *Marbury v. Madison* along with the modern civilians. Notwithstanding a pronouncement of the Privy Council in England, the Australian bench and bar insist upon the authority of Australian courts to pass upon the constitutionality of state statutes, and the Privy Council itself has felt bound to pronounce invalid a confiscatory statute enacted by a Canadian province. Even continental publicists are found asserting it a fundamental defect of their public law that constitutional principles are not protected by an independent court of justice. Moreover, if in the eighteenth century, while the absorption of the law merchant was in progress, Anglo-American law received not a little of the civil law indirectly through the continental treatises on commercial law, which exercised so wide an influence at that time, the balance was well restored in the nineteenth century. In the more recent development of the subject, the commercial law evolved in the English courts has played a leading part, and continental jurists do not hesitate to admit that in this way a considerable measure of English law has been received into European legal systems. Above all, the most significant movement of today in the countries that received the Roman law is a change of front from the Byzantine idea of a closed system of rules, authoritatively laid down, which judges may only apply in mechanical fashion, toward the common-law idea of judicial development of the law through the decision of cases. No one can doubt that our Anglo-American system, no less than its older rival, is a law of the world.

While the English common law is now thoroughly established as the basis of our legal institutions, we must not overlook that there was a critical time when there was a real danger that English law would not be received in the United States. Indeed, if a Roman-French legal literature in English had sprung up in early nineteenth-century America, we might easily have been drawn permanently into the current of the modern Roman law; and as late as 1856 Sir Henry Maine believed that such an event was impending. For the

crucial period was the first half of the nineteenth century. The common law had a precarious hold upon colonial America. Colonial administration of justice was at first executive and legislative, and these types of non-judicial justice persisted well into the last century. The Puritan was suspicious of English law and was heir to a tradition averse to English lawyers. Cromwell had found the bar of his day as intractable as James I had found Coke and his brother judges, and had given up a vain struggle with the words, "the sons of Zeruiah are too hard for us." Milton had thundered that they ground "their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees." The pamphlet literature of the commonwealth teemed with attacks upon the legal profession, and the pious Puritan, apart from religious considerations, apart from his doctrine of consociation rather than subordination, apart from his belief in the individual conscience as the ultimate measure of conduct, was naturally disposed to regard law as "a dark and knavish business," and to regard lawyers as mischievous parasites upon society. When at length the economic development of the colonies required judicial justice administered in courts, the demand for law was chiefly in commercial matters where English law was still formative. With a few conspicuous exceptions, the courts before and for some time after the Revolution were made up largely of untrained magistrates who administered justice according to their common sense and by the light of nature, with some guidance from legislation. Until the Revolution it was not considered necessary or even expedient to have judges learned in the law. When James Kent went upon the bench in 1791 he could say with entire truth: "There were no reports or state precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own and nobody knew what [the law] was." After the Revolution the public was extremely hostile to England and to all that was English, and the common law could not escape the odium attaching to its English origin. Judges and legislators were influenced by this popular feeling and there was no organized and well-trained bar to resist it. There were good lawyers here and there throughout

the country. But the bulk of the profession was made up of men who had come from the revolutionary armies or from the halls of the Continental Congress and had brought with them many bitter feelings and scanty knowledge of law. The economic conditions of the time made lawyers highly unpopular, and even a more coherent and better trained bar might have hesitated to take up the cudgels for English law. For the air was full of notions of natural law. Men believed it possible by an effort of pure reason to spin out a perfect code, good for all men in all times, in all places. Holding such ideas, it was natural that they should resent any serious investigation of the English books, and perhaps endeavor to palliate their lack of information by a show of patriotism. Moreover, while English law was in a state of medieval crudity and transitional chaos tempered by Blackstone's Commentaries, French law, already reduced to an attractive semblance of system and order by the writings of Pothier, was about to be codified, and so seemed by comparison a region of reason and light. A large and politically powerful party were enthusiastically attached to France, and not only heartily detested things English but were inclined to look more than favorably upon things French. More French law crept into our legal system at this time than we have been wont to suppose. Much more might have crept in, and we might even have had codes along French lines had it not been for our law schools teaching English law, and above all had it not been for Dane's foundation which enabled Story to deliver his academic lectures to the whole country in the form of his epoch-making treatises.

Truly the stars were in a happy conjunction when the Dane professorship was founded. The tradition of the Inns of Court had insured that an Anglo-American academic law school, established and conducted by common-law lawyers, would be a professional school. The philosophical ideas of the time in which Story had been trained had insured that a school under his guidance would be a school of law, not of the rules of law of this or that time or place. The necessities of the time when the school was founded had made it a school of Anglo-American law; and Story's zealous exposition of the dogmas of that law, in the light of a natural-law philosophy and of comparative law, as declaratory of

universal principles of natural reason, enabled it to remain a school devoted to the system of the common law that shares with Rome the legal allegiance of the world of today. Under Langdell the three were thoroughly fused by the working out of scientific methods of teaching and study. In the pseudo-Platonic Minos, Socrates tells us that law seeks to be the finding out of reality. Story had sought reality through comparative law, proving the soundness of the traditional doctrines, derived from English experience of administering justice, by showing their likeness to those reached independently, but as declarations of natural law, by Roman jurist and modern civilian. Later, after the common law had been fully and decisively received and could stand by itself, Langdell sought reality in analysis of the authoritative common-law materials. Still later Ames sought reality in historical investigation, in the endeavor to discover common-law principles in their earliest and simplest forms and to interpret them as expressions of an idea of right and justice. Thus from the days of Story the Harvard Law School has been a school of law, not of rules of law; and yet it has been a professional school and a school of the common law. It has not followed the fleeting juristic or judicial fashions of the moment. It has sought to find and to hold fast to reality. But it has sought reality in the enduring element in Anglo-American experience of administering justice and has sought to grasp and to interpret this reality to the end of raising up lawyers to be ministers of justice in English-speaking communities governed by the common law.

When we say that the Harvard Law School is a school of the common law, we do not mean that it is committed for all time to some closed system of doctrine or to any dogmas that are to stand fast forever. Our classical common law was never definitely formulated as a whole after the manner of the *Corpus Juris Civilis*. Our few books of authority are limited in scope and have to do only with the strict law as to estates in land. For the rest, the continuity of the common law is not in its content, but in its spirit. It endures as a mode of legal thinking and as a manner of deciding concrete controversies rather than in any rules or doctrines. In its spirit—in the spirit of the medieval law of the land, of the seventeenth-century due process of law, of the legal pro-

visions of American bills of rights—it has a true unity, if not from the days of Choke and Brian and Fortescue, certainly from the age of Coke to the present. As a mode of deciding causes, as a mode of developing legal materials and of reasoning upon legal subjects, it is the same in England, in the United States, in Canada, and in Australia. In these respects it is the same in substance in one century and in the next. And yet between the days of Coke and the present equity has developed and has been systematized; the law merchant, that Coke had but heard of, has grown up and has been absorbed into the body of the common law; rules have disappeared, have altered, have sprung up and decayed or have sprung up and multiplied into wholly new departments of the legal system.

If one might venture to name the characteristic institutions of the common law, no doubt he would choose the doctrine of judicial precedents, trial by jury and the doctrine of the supremacy of law. Each of these has had its vicissitudes in Anglo-American legal history, and each is more or less under attack in the present. Yet each endures, and they seem to mark our legal system as distinctly as reliance upon texts, piecemeal trial and a Byzantine conception of the relation of the state official to the law mark the legal system that derives from Rome. None the less, if we are to think of these institutions *sub specie aeternitatis*, we must put them in much less definite form. The doctrine of precedent, always anathema to the layman, and irksome to courts in periods of legal growth, perhaps has its enduring element in the application of reason to judicial experience rather than to juristic or legislative texts, in a settled course of relying on judicial decision of actual controversies as the basis of judicial and juristic reasoning rather than on deduction from conceptions reached *a priori* or on abstract formulations made in advance of controversy and independent of concrete situations of fact. Nor may we be more precisely dogmatic with respect to trial by jury. The civil jury is slowly dying out in England, and signs that it is moribund are not wanting in America. Here again the enduring element in the institution is something less defined and more universal. Perhaps it is to be found rather in the mode of hearing causes and of determining issues of fact which has

grown out of the trial by jury. For whatever happens to the civil jury, we have here a legal institution full of life. The federal equity rules of 1913 definitely superseding for American equity the civil-law modes of proof and of trial borrowed by the chancellor from the procedure of the church, and setting up in its place the method of oral examination and cross-examination of witnesses in open court and hearing of the cause as a whole, developed by the exigencies of jury trial, may mark the triumph over a Romanist intruder of what is permanent in a characteristic mark of the common law.

Chiefly, however, contention has raged about the doctrine of the supremacy of law. Throughout the sixteenth and seventeenth centuries the common-law courts struggled to maintain it against the crown. In the eighteenth and early nineteenth centuries American courts struggled to maintain it against the legislature. Within the memory of the youngest of us a vigorous fight has waged to throw it over in order to set up untrammeled authority in the plurality of the electorate for the time being. There is a close parallel here in more senses than one. In the seventeenth century it was progressive to insist upon the royal prerogative. Those who thought of the king as the guardian of social interests and wished to give him arbitrary power that he might use it benevolently in the general interest were enraged to see the sovereign tied down by antiquated legal bonds discovered by lawyers in such musty and dusty parchments as Magna Charta. To them the will of the king was the criterion of law; and it was the duty of the courts, whenever the royal will for the time being was ascertained, to be governed accordingly, since the judges were but the king's delegates to administer justice. In the eighteenth century the center of political gravity had shifted to the legislature. That body now thought of itself as sovereign and conceived that, no matter what the terms of the fundamental law under which it sat, the courts had but to ascertain and give effect to its will. Within the present century, when the center of political gravity had shifted to the plurality of the electorate voting at a given election, those who thought of pluralities and militant minorities as the guardians of social interests and would give them arbitrary powers that

they might use them benevolently in the general interest, were enraged to see the sovereign tied down by what seemed to them dead precedents and antiquated legal bonds discovered by lawyers in eighteenth-century bills of rights. The judges were but the delegates of the people to do justice. Therefore, it was conceived, they were delegates of the plurality that stood for the whole in wielding general governmental powers. In each case it was insisted that the will of the ruling organ of the state, even for the time being and for the cause in hand, must be both the ultimate guide and the immediate source to which judges should refer.

Toward king and legislature and plurality of the electorate, the common law has taken the same attitude. Within the limits within which the law recognizes them as supreme it has but to obey them. But it reminds them that they rule under God and the law. And when the fundamental law sets limits to their authority or bids them proceed in a defined path, the common-law courts have consistently refused to give effect to their acts beyond those limits. Juristically this attitude of the common-law courts, which we call the doctrine of the supremacy of law, has its basis in the feudal idea of the relation of king and subject and the reciprocal rights and duties involved therein. Historically it goes back to an underlying conception of Germanic law, to which all notion of arbitrary will was foreign, which postulated a fundamental law above and beyond mere will, and conceived that those who wielded authority should be held to account for the conformity of their acts to that law. Philosophically it is a doctrine that one man's will is not to be subjected to the arbitrary will of another and hence that the sovereign and all the agencies thereof are bound to act upon principles, not according to arbitrary will; are obligated to conform to reason instead of being free to follow caprice. Such, perhaps, is the permanent and universal element in this characteristic common-law doctrine. But there is a common element in two at least of these characteristic institutions of the common law. The same spirit is behind the doctrine of precedents and the doctrine of the supremacy of law. The doctrine of precedents means that causes are to be judged by principles reached inductively from the judicial experience of the past,

not by deduction from rules established arbitrarily by the sovereign will. The doctrine of supremacy of law is reducible to the same idea. It is a doctrine that those who wield sovereign powers and their agents are not free to follow their own wills wherever mere will or impulse leads them, but are bound to act upon principles and to follow reason. Thus we may say with Coke in very truth that "the common law itself is nothing else but reason." And thus, when we say that this is a school of the common law, we mean that it is a school that believes in social control through reason and not through arbitrary fiats of the sovereign will; that it is a school which believes in law in a scientific application of reason to the problems of the legal order, not in rules of law resting upon the authority of a sovereign; that it is a school which expects to find this reason and the means and modes of applying it through study of the experience of English-speaking peoples in administering justice; that it is a school which believes it a postulate of civilized society that everyone, in or out of authority, rules and acts subject to God and the law.

"I suppose it to be self-evident", said Jefferson, "that the earth belongs to the living; that the dead have neither powers nor rights in it. No society can make a perpetual constitution nor even a perpetual law. The earth belongs always to the living generation. Every constitution, then, and every law naturally expires at the end of thirty-four years". Taken literally, it goes without saying that Jefferson's proposition can not be maintained. Yet there is more truth in it than the law in the books and the current modes of legal thinking make appear. Consider the continual change which has gone on in the scope and content of law teaching at Harvard in the brief century of the school's existence. In three generations, as Jefferson reckoned them, there were three changes of deep significance. At first the chief subjects of instruction were the feudal law of real property, including even the cumbrous learning of real actions and the minute formal technicalities of eighteenth-century common-law procedure; subjects called for by the homogeneous, pioneer, agricultural community of the early nineteenth century, in which land was the important interest and the controversies of a rural

population did not require a swift-moving justice. Later, with the rise of a commercial interest, as the energies of the economically dominant were engaged in foreign commerce, emphasis was shifted to commercial law, and a pedantic Romanized law of bailments came to hold the first place. When Langdell came, the emphasis shifted again. For a generation, teacher and student gave themselves to analytical and historical development of the classical common-law materials, as was demanded by the call of the maturity of law for security and uniformity. Today, we see a new element coming in with the study of administrative law and of the principles of legislation; subjects demanded by the heterogeneous, industrial, urban society of the twentieth century.

Lawyers have liked to think of fixed rules, mechanically applied, which stand fast for ages; of settled postulates involved in the very nature of things and a perfect logical technique of developing them; of eternal principles and their necessary implications; of a closed system admitting only of formal improvement. And in many ways it has been well that they have been wont to think in such fashion, for the legal order is a social device to eliminate friction and prevent waste; it is one of the means by which civilization conserves energy and conserves the goods of existence to meet human wants. The great source of friction is human wilfulness, and the great cause of waste is insecurity. Hence throughout legal history men have been solicitous above all things to hold down arbitrary and capricious action, whether of private individuals or of magistrates, and to maintain the general security. And this has led lawyers and even philosophers to an instinctive fear of change lest the bogie of magisterial arbitrariness or individual wilfulness gain some unanticipated advantage. Aristotle feared to allow recovery of a less sum proved due in an action brought to recover a greater sum, as proposed by a law reformer before his time, lest to permit the dikasts to do anything but decide the formal issue might turn orderly legal adjudication into mere haphazard arbitration. Scaevola thought it required a strong judge to be entrusted with the power of allowing a set-off. The sixteenth-century serjeant-at-law, who replied to Doctor and Student,

objected to injunctions against enforcement of bonds paid but not formally released "for as moch as conscience is a thing of great uncertaintie." Selden thought the measure of equity might quite as well be the chancellor's foot. Even Jefferson, who believed that all laws expired by limitation in thirty-four years, would have received English law in Virginia as of the first year of George III in order to get rid of "Mansfield's innovations" in the way of absorbing equity and the law merchant into the common law. Thus the paramount social interest in the general security, which has dictated orderliness, certainty, system and rule in the administration of justice, so that men may rely on reasonable appearances and act with assurance in their everyday businesses, unworried by the aggressions of others and unharassed by the caprice of their rulers, has made also for suspicion of even the necessary minimum of discretionary magisterial action. In like manner it has made for suspicion of all change. The lawyer's ideal has been a permanent, stable, fixed, certain law. In striving for this ideal he is able to make the administration of justice reasonably uniform and orderly and predicable. But along with this desirable result, it leads him to scout projects for reform and to look askance at all attempts at change, lest in a vain essay to improve we but shake the stability and permanence of the legal order and open opportunities to the wilful and the capricious.

On the other hand, just because the legal order is a sort of social engineering and its tasks are engineering tasks of conserving values and eliminating friction and preventing waste in human use of the goods of existence and enjoyment and application of them to human wants, the law of a time and place can no more stand fast as the final thing in human legal achievement than the products of mechanical engineering can maintain themselves as the highest outcome of mechanical inventiveness and constructive skill. The infinite variety of human wants and incessant changes in the means of satisfying them require continual changes in the materials and methods and products of social as well as of mechanical engineering. Whether we will or no, we must ever face demands for law reform. Doctrines and rules and institutions are no more than established when

we must begin to question and revise and overhaul them. Law reform is as old as law, and as long as civilization moves, law must move with it. It is only in long periods of social stagnation, such as the eastern Roman empire, that legal or political institutions may remain for centuries in a permanently established form. Hence useful as is the lawyer's theory of fixed law, it is an illusion. The reality is a complex and ever-changing legal order, whereby values are conserved and wants are satisfied, worked out along with all human institutions as both a condition and a product of civilization, and growing with the progress of civilization.

In the classical period of American law — the period from the Revolution to the Civil War—for a time lawyers were full of reforming zeal. The theory was that the common law of England was in force with us only so far as applicable to our conditions, and under the influence of that theory the courts were working out new principles and making over the traditional English materials into a common law of America. Mr. Justice Campbell was a thoroughly conservative lawyer and is perhaps typical of the best lawyers of that time. As late as 1858 he said: "A statesman could fulfill no task more useful than that of adapting our laws to the varying wants of our society. We know of no responsibility more sacred than that which devolves upon the directing minds of our southern states of maintaining sound principles on this subject. We ought not to ally ourselves with the worn-out maxims of other ages, but maintain steadily and systematically the ascendency of those principles of progress and amelioration which are the vital essence in the growth of a well-organized society." After the Civil War this creative period was succeeded by a period of stability. And yet change went forward steadily beneath the surface in the last generation. One need not speak of the drastic legislative changes that have given us workmen's compensation over against the dogma of no liability without fault, nor of the rise and growth of administrative justice at the expense of judicial justice. Changes quite as significant have been going on in the exclusive domain of the common law and have been wrought by judicial decision, its characteristic agency. For example, many of the

typical rules of nineteenth-century law and of nineteenth-century origin have disappeared or have become moribund within a generation. A generation ago arbitrary rules as to imputed negligence were enforced by the courts and stood for law in the books. This doctrine originated in the nineteenth century and all but died in that century. The current began to turn against it in 1886, and so rapid has been the movement that today only a few lingering remnants remind us of the once authoritative decisions in *Thorogood* v. *Bryan* and *Hartfield* v. *Roper*. A generation ago the doctrine of *Winterbottom* v. *Wright* was flourishing, although less than a decade after that case was decided the courts had begun to load it with exceptions. Today its complete overthrow seems a matter of relatively few years. A generation ago we believed in and applied and taught an arbitrary rule that there might be no recovery for fright unless there were a physical impact. That rule, too, has been yielding steadily before the current of decision of the last two decades and is now practically extinct in England. And so one might review every department of the law, as I have just hastily surveyed the law of torts, and show how large a part of what we set store by in the last decade of the nineteenth century has already passed into legal history. But let us not forget that a generation ago we delighted in these arbitrary rules. They seemed to show that law was law; that it was something to tie to; that it was something a student might put in his note books and learn with confident assurance that he had a permanent acquisition, independent of fleeting ideas of time and place as to what was right and just, resting on no less a foundation than the social necessity for law and justifying itself because it was law.

Not only have arbitrary rules disappeared in the last generation, but a deeper-seated change has taken place in the increased reliance upon legal standards and replacing of hard and fast rules thereby. These legally defined measures of conduct, to be applied by or under the direction of tribunals, are late developments in the law. Nineteenth-century courts distrusted them and sought to put them into straitjackets. Degrees of negligence, attempts to lay down absolutely that this or that was negligence as a matter of law, and the "stop, look and listen" rule bear witness

to suspicion of standards and desire to subject conduct to fixed, detailed legal rules. There was good reason for this distrust from the standpoint of the nineteenth-century lawyer, for in contrast with rules standards seemed to threaten certainty and impair security. Take the standard of due care under the circumstances which obtains in the law of torts, the standard of reasonable service in the law of public utilities, the standard of the conduct of a fiduciary in equity, the standard of reasonableness in the law as to restraint of trade, and the standard of due process of law in passing on the validity of legislation under the Fourteenth Amendment. A common idea of reasonableness or fairness runs through them all, and in consequence they must have a variable application with time, place and circumstances. Moreover, most of them contain a certain moral element, and so application of them calls for common sense or the average moral judgment rather than for deductive logic. As Mr. Justice Holmes so aptly put it, our applications of them "depend on intuitions too subtle for any articulate major premise." We may not expect absolute agreement among those who have to apply these standards, and for that reason the nineteenth century would have discarded them. But we have learned that where the administration of justice has to do with human conduct or with the conduct of enterprises it may be a useful bit of social engineering to have such standards applied in the light of the intuitions of trained and experienced judges. One need cite but a few examples to show how complete and how extensive this change has been. In the last century more than one able court tried persistently to put negligence into detailed rules. The only result, beyond irritating public opinion in some commonwealths to the point of taking matters of negligence completely away from judicial power, was to establish firmly the standard of due care under the unique circumstances of each case, as a formulation of the general expectations of society as to how individuals will act in the course of their undertakings, by which to guide the common sense of the trier of fact when called on to judge of particular conduct under particular circumstances. Again the last century tried to put the law of carriers into the form of hard and fast rules,

and failed no less signally. In place of the old pedantic law of bailments with its fixed categories and consequences attaching to classification in this or that systematic pigeonhole, a law of public utilities has arisen with standards of reasonable service and reasonable facilities. Even in the law of property, where rules and narrowly defined conceptions are peculiarly appropriate, whenever conduct comes to be involved the law of today is turning to standards. Witness the law as to spite fences, as to surface water and as to underground water, where standards of reasonable use have definitely replaced the dogma that the owner might do as he would with or on his own property.

Of even more significance is a change in the whole spirit of our legal thinking. The joy and faith in long established rules for their own sake, the assumption that the common law gives us a body of ultimate principles ordained from the beginning, and faith in absolute deduction from them, the faith in the abstract justice of the content of abstract rules, which were characteristic of the nineteenth-century lawyer, are disappearing. The point of view of today is functional. In the last century two ideas dominated Anglo-American legal science. One was the idea of rule, the conception of law as an aggregate of rules of law of the sort that we find in the law of real property, — an idea which still governs in English analytical jurisprudence. This idea is derived from the strict law, which seeks to achieve its ends by means of rule and form, and its currency in legal thinking is to be explained in that legal literature begins in this stage and takes its color therefrom at the outset. The other is the idea of absolute principles of universal validity, derived from the philosophical jurisprudence of the seventeenth and eighteenth centuries. This idea has been strong with us because it represents the modes of thought of the time when American legal and political institutions were formative, and is authoritatively set forth in our classical texts. Accordingly, starting under Romanist influence with a philosophical will theory, an attempt to explain everything in terms of willed action as either culpable conduct or an implied term of what had been intentionally declared as will, we turned to analytical theory, in which we sought to find

universal principles of absolute validity by analysis of the content of the classical common law, and passed thence to a historical theory in which we attempted to find all the law of today implicit in the Year Books. All this is definitely giving way to a functional conception, to an endeavor to ascertain how we may make our traditional legal materials effective toward the ends of the legal order. The legislative reform movement of the nineteenth century was not a constructive movement. It was a movement to clear away what had come down from the middle ages and had been spared in the liberalizing stage of equity and natural law. It culminated in a movement for improvement in the form of law which was strong in England in the middle of the nineteenth century and had not a little strength in the United States down to the last quarter of that century. The attitude of the thinking lawyer of today is very different. In and of themselves, anachronisms and defects of form trouble him not at all. He is interested only in knowing how they affect the actual administration of justice. And he calls for more than the wiping out of anachronisms and improvement of form, in any event. He calls for more than the abstractly just rules, be their operation what it might, with which the last century was well content. He calls for just results in action, and he judges all legal institutions and legal doctrines functionally with reference to how and how far they enable us to attain the ends of the legal order.

While these changes have been going on, the social and economic causes that have brought them about have wholly changed the balance between law and administration which had been established in the contests between courts and crown in seventeenth-century England and had been taken to be fundamental in our polity. A generation ago observers were wont to say that we were a judge-ridden people. Then almost every important measure of police or of administration had to run the gauntlet of a suit for an injunction. If public funds were wasted, the remedy was a taxpayer's bill. If the peace was disturbed, appeal was made, not to the police nor to the administrative authorities, but to a court of equity. We thought it fundamental to confine administration to the inevitable minimum

and conceived that a government of laws was possible only by making governmental and administrative questions into questions for the courts. Today it may be said with much more truth that we are a commission-ridden people. Today every side and almost every item of our lives is governed actually or potentially by some administrative commission. All public and all quasi-public service and all the details of such services are under the control of commissions. Through control of transportation and its incidents, commissions can make and unmake businesses, industries, communities, cities — yes, whole regions. Restraint of trade is now a matter for the federal trade commission. In many states the sentence of the court in a criminal prosecution is now a mere form and the actual nature and duration of punitive treatment of convicted offenders are left to a commission. In many states industrial commissions dispose of controversies between master and servant and within large limits mold the actual rules that in practice govern that relation. In more than one commonwealth, insurance commissioners, labor commissioners, commissioners of small loans or shipping commissioners do the work of lawyers by giving legal advice and rendering actual assistance in different branches of the law. In one state, agricultural commissioners, not courts of equity, regulate the relation of principal and agent when the one happens to be a farmer and the other a commission merchant. Rent commissioners control the incidents of the relation of landlord and tenant. Boards of engineers, state water boards and land title registration commissioners are often given wide powers over one's title to and enjoyment of one's property. Even our supposedly fundamental political dogma of the separation of powers yields to the pressure for government by commissions. More than one state has expressly abrogated that dogma by constitutional amendment in order to be able to give plenary powers to public service commissions. Judicial powers are conferred upon them whenever judicial construction of constitutions will permit, and ingenious devices are resorted to that they may have the substance of judicial power while the shadow is reserved for the courts. More and more it has become the fashion to give them a wide rule-

making power, a wide power of filling in the details of legislation, a wide power of replacing common-law standards of reasonableness by fixed rules and detailed rates and exactly limited zones, which is none the less legislative because it is more conveniently exercised by such bodies than by legislative assemblies. Indeed the up-to-date American statute setting up an administrative commission contains something very like a *lex regia* and sets up something very like a Byzantine *princeps* only that the scope of the authority of that *princeps* is limited to one general subject. Within the limits of that subject, it may be as autocratic as Basil Bulgaroktonos, as free to follow its own conscience as St. Louis under the oak at Vincennes, or as capricious as Harun al Raschid or Baldwin of the Hatchet.

Each of the characteristic institutions of the common law is threatened by the recrudescence of personal government involved in this era of administrative commissions. Its doctrine of drawing principles from the judicial experience of the past to decide the controversies of the present is threatened by administrative methods which treat all questions concretely as particular questions, not as illustrations of some general principle; which regard administrative action as a unique series of independent acts. Its doctrine of hearing causes as a whole in open court is infringed by administrative inspections by agents and deputies and decisions made on secret reports. The common law knows of no such institution as a deputy judge. Even more, the whole genius of administrative action through commissions endangers the doctrine of the supremacy of law. Not the least task of the common-law lawyers of the future will be to impose a legal yoke upon these commissions, as Coke and his fellows did upon the organs of executive justice in Tudor and Stuart England, and to reshape and develop the materials of our common law as efficient instruments of justice in the twentieth century so that reversion to oriental methods no longer seems necessary.

But perhaps enough has been said to demonstrate that a professional school which is a school of law, not of rules of law, and a school of the common law, may find a place in the history of civilization, may save the common law to

be a law of the world, today no less than in the days of Joseph Story. In the beginning of the twentieth century as in the beginning of the nineteenth, the future of American law is linked with the future of American legal education. Nay, more. Our Anglo-American polity is so characteristically and so completely a legal polity, that the future of legal education is nothing less than the future of American institutions. Let us carry forward the work of Story and Langdell and Ames in their spirit — which was the spirit of the common law — not in the way of dogmatic exposition of authoritative formulations of ultimate wisdom, but in the way of scientific investigation of a living process of growth and adjustment, to the end that our successors, at the end of another century, may find the spirit of the common law preserved and handed down to them, and may receive its characteristic institutions unimpaired.

SOME OBSERVATIONS ON LEGAL EDUCATION AND DEMOCRATIC PROGRESS

ADDRESS OF HON. CHARLES E. HUGHES

IF our laws were deemed to register our progress, there would be little disposition to boast. Rather their study tends to create in the lover of democracy a humble and contrite spirit. The conquests in science, the development of technical skill, the extraordinary increase in the facilities of communication and the enlarged resources of comfortable living and enjoyment which give the content of our civilization, show an advance which we feel should have its counterpart in the exhibition of a highly improved practice in self-government. But here, despite long experience, the results are disappointing. It is not that in the conduct of public educational and relief work, in asylums and prisons, we do not find vast improvement in both standards and administration. The heart of humanity manifests its humane impulses in a thousand ways. It is not that the vitality of the democratic principle lacks demonstration; on the contrary, we observe a constant demand for more democracy to cure our ills. The unpleasant reflection is that while we so unceasingly proclaim the principle, we make such a poor showing in its application. While our inventors are constantly learning new ways of controlling the forces of nature in order to serve the needs and pleasures of man, while engineering in war and peace is astounding us with its vision and precision of execution, it is in the art of governing ourselves — it is with regard to the common understandings and rules of action which we call laws — that we not only fall short of what we should expect in a free people of so

great intelligence, but we frequently present a sorry spectacle. The self-restraint which should have been fostered by miscarriages of plans for legislatively contrived utopias is not conspicuous. A passion for legislation is not a sign of democratic progress, and in the mass of measures introduced in the legislatures of our free commonwealths, there are too little evidence of perspective, and an abundance of elaborate and dreary futilities. Occasionally, a contructive measure of great benefit is skilfully planned, but we are constantly impressed with the lost motion and the vast waste in the endeavor of democracy to function wisely.

We should naturally expect that experience as a free people would have had fruition in a demand for certainty in laws, as it is vital to liberty that the scope of inhibition should be understood in advance through the promulgation of laws, which, whether or not well conceived, are at least well understood. But in this matter of first importance, we look in vain for progress. It would undoubtedly surprise a visitor from Mars to be told that in this enlightened nation, after more than a hundred years of the best institutions of free government ever devised, the industrial and commercial activities of the people have been governed by statutory provisions under which, except in the simplest cases, no one, however expert, could make a safe prediction. Controversies as to legislative policies are apt to issue not in any victory of defined import but in a compromise of vagueness, where all may claim success and no one may know what the rule of action is. The regrettable thing is not that this sometimes happens, but that the tendency to enact uncertain laws seems to be increasing, and, what is still worse, that the people tolerate it and that there are but faint demands for improvement. Our material progress seems to have created complexities beyond our political competency, and disregarding the lessons of history there has been a disposition to revert to the methods of tyranny in order to meet the problems of democracy. Intent on some immediate exigency, and with slight consideration of larger issues, we create autocratic power by giving administrative officials who can threaten indictment the opportunities of criminal statutes without any appro-

priate definition of crime. When King John in the great charter said, "And we will not set forth against him nor send against him, unless by the lawful judgment of his peers and by the law of the land," the assurance was of protection against arbitrary power, and we should know by this time that arbitrariness is quite as likely to proceed from an unrestrained administrative officer of the republic reigning by the grace of an indefinite statute as by the personal government of a despotic king. Finding the intricacies of modern life too much for clearly expressed law, we have formed the habit of turning the whole business over to bureau chiefs, who with the opportunity to create manifold restrictions and annoyances hold the power of life and death over enterprise and reputation. This has seemed to be a comfortable way of dealing with evils, and the mischief it has been breeding has received scant attention. We went to war for liberty and democracy, with the result that we fed the autocratic appetite. And, through a fiction, permissible only because the courts cannot know what everyone else knows, we have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly after the military exigency had passed and in conditions for which they were never intended, and we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged.

Apart from these conditions, we cannot afford to ignore the indications that, perhaps to an extent unparalleled in our history, the essentials of liberty are being disregarded. Very recently information has been laid by responsible citizens at the bar of public opinion of violations of personal rights which savor of the worst practices of tyranny. And in the conduct of trials before the courts we find a growing tendency on the part of prosecutors to resort to grossly unfair practices. Even as I speak, there appears in the "Harvard Law Review" a striking summary of this sort of lawlessness:

> "During the past year no less than forty-four convictions were reversed by appellate tribunals in the United States for flagrant misconduct of the public pros-

ecutor or of the trial judge whereby the accused was deprived of a fair trial. In thirty-three of these cases the district attorney made inflammatory appeals to prejudice upon matters not properly before the jury. In three of them the district attorney extorted confessions or coerced witnesses by palpably unlawful methods. In four, witnesses were so browbeaten during the trial as to prevent the accused from fairly making his case. In two, the trial judge interposed with a high hand to extort testimony unfavorable to the accused or to intimidate witnesses for the accused. It is significant that these cases come from every part of the country and from every sort of court".

It might be supposed that the descendants of those who placed in a written constitution the guarantees of Magna Charta, and expounded them so as to protect against arbitrary legislation, as well as arbitrary and capricious administration, would have had such a sure instinct for liberty as to leave no occasion for invoking the most obvious of our basic principles, and yet in this hour we find imperative need for a new birth of freedom and a sharp call to make the old guarantees once more vital and real, and to give the assurance of liberty under fair laws and responsible administration.

So deep is the concern of all that we should have improvement in self-government that we need have no apologies in giving emphasis to whatever affords a more careful training in the law and reinforces the profession of the law by assuring better equipment and more intelligent and public spirited service. Autocracy may not need lawyers; democracy cannot live without them, for the life-breath of democracy is law, the will of the people expressed in those understandings and adjustments which a free people may arrive at in order to secure individual opportunity and common welfare, implying the right of the individual at all times to invoke principle and precedent as against arbitrariness and uncontrolled discretion, to rely upon the established custom, the promulgated and definite rule — the right to expert and independent judges, and the opportunity to secure the aid of a learned profession skilled in knowledge of the law. Democracy

viewed as orderly government is impossible without the reign of law — the antithesis of anarchy, class rule and despotic will; and the chief concern of lawyers and law schools is to make the reign of law the reign of right reason.

The service of the law school is that of method and cooperation, of standards and ideals. It does not supply brains or tact, or any substitute for either. It can give but a modicum of legal learning, less now, relatively, than ever. The best informed among us can know but a small part of the law, if it is considered as the body of existing rules and precedents contained in statute books and reports. We seem to be picking our way through a thicket where old trails are overgrown or have become blind, where there are many false blazings, where even the official directions are frequently wrong, and it is more than ever difficult to be an expert guide. The law student returns from the law school to his State to find that of most of the law which directly bears upon the life of his community, in volumes of compiled statutes, municipal charters and ordinances, rules of practice, and decisions which have construed all these, he knows practically nothing. He sees at once, if he did not appreciate it before, that little has counted in his preparation but method and self-discipline.

And in this feeling of bewilderment and sense of the only path to mastery, there is nothing new. How did the masters arrive in the absence of great law schools? Who taught Mansfield and Eldon, Marshall, Story, Kent and Shaw? We call to-day the roll of great teachers, but who taught these teachers? There is only one answer. The great lawyer has always been a great teacher and his best pupil is himself. The youthful Story, weeping bitterly over Coke upon Littleton, abstracting Fearne, repeatedly perusing Saunders' reports until he acquired a relish for what he called the severe study of special pleading; Kent, in a country law office laboriously dealing with what he once called "voluminous rubbish and the baggage of folios" that he might obtain a comprehensive knowledge of everything available in the field of English law; young Benjamin, employing the leisure hours of his early practice in making for his personal use a digest of all the decisions

of the Supreme Court of his State—illustrate the ambition and assiduity which, with special aptitude, have given to the great masters their technique. It was inevitable that as material increased those who were skilled in exposition should attract students and that the method of instruction should have been devised to supply the need most keenly felt, to have a bringing together of results in a statement of legal principles — a convenient resume for the student, but representing the mastery achieved by others. The helpfulness of this, no one may doubt. It gave illumination and synthesis, resolved uncertainties, took the student out of his bewilderment as it disclosed system, and brought him to the high elevations where his eye could see at a glance the contour of a long stretch of country. Perhaps in no department was the fascination of instruction greater. What was dull and difficult in the treatise became simple and luminous in the light of the exposition of a brilliant mind.

"Story", said Parsons, "carried one away with the irresistible attraction of his own swift motion." Greenleaf, "by the charm of his silver voice, the singular felicity of expression and the smooth flow of his untroubled stream of thought, caught and held the attention of the listener." And in speaking of Parsons, Joseph H. Choate voiced an estimate of the advantages of the instruction he received which is ofttimes expressed by others and with respect to other great teachers — "While uttering the foundation principles of the common law, he impressed them upon the minds of his hearers in a way that I for one have succeeded in carrying always through a long professional career."

But along with the advantage of fascinating exposition went the danger of mere receptivity. The rapid growth of material tended to discourage first-hand examination of sources, and an easy familiarity with dogmatic statements of principle brilliantly expounded too often bred a delusion of acquisition, which was the undoing of those inclined to avoid toil. The future leaders proved their superiority by taking the exposition as a welcome guide, but not as a substitute for the toilsome journey. They continued to aspire to the arduous greatness of individual mastery. James C. Carter, eloquent in his tribute

to the great teachers of his day, laid emphasis upon the fact that the lawyer's understanding does not "firmly grasp the subject upon which he is engaged until he turns to the actual *cases* as recorded in the reports and finds in them the *living* law as it has been actually developed by the real transactions of men." What was necessary for a Carter could not be regarded as negligible by those less favored. It was inevitable that the standard of scientific method in teaching law should be raised, and it is the peculiar distinction of this school that it was raised here. Let the aim be set forth in the matchless words of Mr. Justice Holmes: "We will not be contented to send forth students with nothing but a ragbag full of general principles — a throng of glittering generalities like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures. They" (the professors of this school) "have said that to make a general principle worth anything you must give it a body; you must show in what way and how far it would be applied actually in an actual system; you must show how it has gradually emerged as the felt reconciliation of concrete instances, no one of which established it in terms. Finally, you must show its historic relations to other principles, often of a very different date and origin, and thus set it in the perspective without which its proportions will never be truly judged."

It was fortunate that the method of historical analysis, thus bringing to legal education the touchstone of reality, had great exemplifiers; and Langdell, Ames, Thayer and Gray, and others who have inspired and directed the students of this school in the course of the last half century, represent what is perhaps the most remarkable and successful adaptation to educational needs that has been displayed in any field. This was the service of direction in self-discipline through which all were made participants in the methods of the masters of every age. Affording stimulus to all, demanding the utmost precision in reasoning from all, it was especially successful in securing from the best minds the maximum endeavor in discriminating study of the sources and development of the law, thus assuring through the happy cooperation of teacher and student the priceless advantage to the com-

munity of exceptional training of men of exceptional talent. It is, however, obvious that the case system is now being put to the most serious test. The simple case books of the earlier period give way to stupendous collections, which still only suggest the superabundance of material. The study of the development of the law cannot ignore the more recent periods; and anything approaching an adequate survey of any part of the field is more hopeless than ever in the brief period of law school attendance. Again, there is need of the simplicity of mastery. These difficulties simply demonstrate the indispensability of the law school because of the increasing need of leadership in the student's effort. But individual analysis still remains the essential discipline, and the problem our law school faculties must solve is how to subdue material to method and not lose the discipline by surrender to material.

Reflections upon the state of the law and the multiplying hindrances which the student encounters indicate the increasing need of the wider service which may be rendered by a body of highly trained experts such as are gathered in our law school faculties. While we deplore the multiplication of statutes and the inordinate demand for legislation, the volume of judicial work — in large part the result of legislative activity — causes the most serious embarrassment. In courts of large importance, taking into account the relation of the controversies with which they deal to the broad interests of the community, it is most regrettable to find constant evidences of pressure and strain. The outward calm of the appellate tribunal is too often but a mask for the troubled judicial spirit suffering from demands too continuous and severe to permit the best judicial work. Legislators may throw up their hands in despair and adjourn only to find that the public have a sense of relief that no more has been attempted. But there is no praise for the court if it fails in the appointed task of deciding cases. The spectre of the calendar is always stalking through the judicial corridors. Then, there is the inevitable disproportion in argument — the waste of time in giving to puerilities the hearing that is due process, and the limitation of argument in causes of first importance in order that they may not hold up litigants with grievances

just as serious from the individual standpoint although of infinitely less public consequence. We watch with anxiety for the point of judicial saturation, and we turn with dismay from the simple calculation which consists in dividing the number of pages of briefs and records annually submitted by the number of judicial hours. We speak not in criticism but in solicitude, as we know that the greatest powers may suffer from too intense and unrelieved exertion. At a time when close and critical study on the part of judges is most needed it has become most difficult, and the marvel is that the work of our courts is so well performed. Along with this, there is the vast outpouring of decisions, requiring appraisement and classification, and lawyers find themselves in a welter of precedents. While I appreciate the natural desire to reduce this output, the remedy sometimes suggested that cases, particularly in the lower courts, should be decided without opinion does not seem to me to be a desirable one. Of course, a vast number of routine cases involving no special difficulty should be so decided, and in fact are so decided. Doubtless more could be; and judges and lawyers alike need constant caution against prolixity. But after all is done that can be expected along this line, the question still remains whether the judge in deciding anything not a matter of routine should decide without opinion or should succinctly give his reasons.

Without disparaging the impartiality and conscientiousness of our judges, and simply recognizing the common frailties of human nature, I think that we should continue to demand reasons for judicial decisions. There are judges with such a complete legal philosophy, with such an equipment of exact knowledge and such clarity of thought, that they rarely hesitate and are seldom lost. They see the end from the beginning, and at times, it must be added, that which is not as though it were. But recognizing the high average of accuracy in exceptional men, still in the main the only way to reach a correct decision is to formulate its grounds. How often the judge is compelled to go back to the conference of his brethren with the words. "It won't write." We have no option, I think, but to endure, and indeed cherish, judicial opinions, not simply from the

standpoint of the student's case-book, but from that of the lawyer immersed in professional activity and of the citizen demanding the best work from the courts.

The aid needed by both courts and practitioners is not only that afforded by well-trained lawyers in particular cases, but by critical specialists. Digests, citations and cross references will be supplied by the industrious commissariat. What we need is the judgment of the connoisseur. The pressure in judicial work is but a phase of the strenuous life which finds illustration in the career of every successful lawyer. The greater the aptitude, the heavier is the burden. His study of the law becomes more and more sporadic and suited to the exigency which limits it. He has time only for particular controversies and the demands of practice, not for systematic examination of subjects. His reading is almost invariably with a bias, as he earnestly seeks the precedent which may be made to fit, or the stray expression *obiter*, often torn from the context which is its natural protector and made to serve an alien argument. He has the broad equipment of common sense reinforced by experience, the grasp of a man of affairs, but he has few opportunities to enjoy the quiet of delightful studies and he is rarely a master of learning. Again, the writer of text books becomes the slave of the market place, producing compilations, cyclopedias, indices, the aim of which is not competently to discuss dicisions but to make them available.

Where shall we turn for the statement of the law, for the patient research of the specialist, for the condensation of material, the philosophical analysis, the detection of departures and trends? With rare exceptions, we must look to the faculties of our law schools, to the little groups of experts, each having a definite field. I am far from suggesting the infallibility of law professors. Their feet, I think both judges and practicing lawyers sometimes feel, are not always on the earth and their voices are not a harmonious chorus. If we formed a high court from among the best of them, they would equally need their critics, and doubtless we should read with unregenerate glee the dissenting opinions which would then flourish in a new freedom. But whatever their differences or their

occasional mistakes — looked at from a point of view which may itself be mistaken — they bring to the bench and bar the incalculable advantage of the best informed and critical judgment when our need for it is greatest. These learned faculties are not simply the guides of youth but the instructors of the profession, and our indebtedness to the distinguished teachers of this school cannot be overestimated.

Much as we appreciate what was done by Story and Parsons, by Greenleaf and Washburn, it is apparent that the sort of work they did could not be regarded as adequate now, and that the task has become more difficult as well as more imperative. But in what has already been accomplished lies the happy promise of the essential service — so rarely appreciated — to democratic progress, the criticism and statement of the law. "A Summary of Equity Pleading" and "A Brief Survey of Equity Jurisdiction" by Langdell, "The History of Assumpsit" and "The History of Trover" by Ames, "The Rule Against Perpetuities" by Gray, the articles setting forth Thayer's penetrating discussions of the law of evidence and of the "American Doctrine of Constitutional Law," Holmes' "Common Law" and articles on "Agency" and Williston's book on "Contracts," to say nothing of a host of important writings, the work of the earlier and the present members of the faculty of this school, now headed by Dean Pound — the range of whose effective and public-spirited labors challenges our constant admiration — constitute the most important contribution made in this country in the course of the past fifty years to the understanding of the law. The "Harvard Law Review" has been in large measure the vehicle of this contribution and in itself has rendered a notable service, guiding and stimulating professional thought.

In thinking of the broader service of the law school, we cannot, however, fail to regard what I mentioned at the beginning and to take account of what may here be done in shaping the ideals of lawyers and in maintaining the essential institutions of liberty. The pressing problem is how we are to adapt government to imperative needs and yet remain free. It is not simply that we are

cluttered with statutes and decisions requiring analysis and the aid of the expositor who can tell us of origins and relations. The practice of government is rapidly changing before our eyes, and as yet the movement is largely without guidance or principle. With respect to activities of first importance, we are turning to what within broad limits is personal government relieved of the scrutiny and supervision heretofore demanded as the traditional safeguard of justice. The movement had a wholesome motive in the desire to escape technicalities, to secure an expertness in dealing with complicated problems which could be expected only through a body informed by a continuous experience in a limited field, and to promote efficiency by obtaining play for the common sense view, the direct approach and the immediate and unhampered decision. Ignoring the distinctions prized by the fathers, and excusing the violation of tradition by easily-made phrases, we unite legislative, executive and judicial powers in administrative agencies, with large spheres of uncontrolled discretion, which may investigate and lay complaint and then try and determine facts upon which the complaint rests, their findings of fact, where there is any dispute in the evidence, being for many purposes conclusive. Useful as are these instrumentalities of administration, they represent to a striking degree a prevalent desire to do without law. There is thus recourse to primitive method in dealing with the most difficult problems of the twentieth century. While it is possible that bureaucracy may show wisdom and efficiency, just as despotism by benevolence and directness may give an admirable government, it is the experience of mankind that liberty in the long run cannot be secure without compelling administration to adhere to accepted and declared principles and safeguarding the individual from the injurious action of officials by affording recourse to impartial and independent tribunals where the announced common understandings which we call laws are enforced. Free institutions are always essentially experimental; they are but approved adjustments and practice to secure liberty; and the constant effort in constitutional government is at once to save the community from exploitation

by individuals and to save individuals from the abuses of officialdom. The dilemma is apparent. If administrative action is fettered by minute requirements imposed by the legislature, if necessary departments are controlled by the constant review of all controversies as to facts by ordinary courts of justice primarily adapted to other needs, the opportunities for dilatory litigation will leave vast activities to the mercy of the cunning, selfish and avaricious, and the means designed for protection will defeat their own purpose. On the other hand, present methods are obviously crude and tend to an intolerable personal government. Here lie the need and opportunity of skilled architects of institutions. In endeavoring to escape delays and the obstacles to an efficient administration, should it not be remembered that, albeit with other procedure and agencies, the essential conditions of justice must be observed? If the courts cannot deal with administrative questions, should we not at least establish administrative tribunals which, expert through special and continuous study of a particular field, should by being free of the *animus* or unconscious bias, of the prosecutor bring to the decisions of questions of fact the same detachment and standards of impartial judgment which have made our courts, after proper allowance for all just criticism, the most successful in their working of all the departments of free government? Is it not time to reorganize administrative agencies not in the interest of theoretical nicety in division of powers, but so as to vest in different officials the distinct functions of prosecutor and judge? Whatever the question, when it comes to determinations which are essentially judicial in character, there should be instrumentalities and process which however facile and swift, secure independance, impartiality and the application of principle. It is peculiarly for those who are both skilled in the history of the law and equipped with knowledge of present necessities not merely to tell us how the law has developed in the past, but in a time of change to furnish guidance to democracy by aiding in the formulation of principle and the perfecting of practice.

It was never more true than now that great bodies of law are in the making. Despite defects in organization, administrative agencies are doing a vast amount of good

work. Commissions and boards, federal and state, in dealing with transportation and various public utilities, with competition in trade and with compensation for injuries in industry, are putting out what has well been called the raw material of the law that is to be. Principles must be sought and declared if we are to escape a government of caprice, of men and not of laws; and there is a large field for research and constructive effort now inviting teacher and student which was unknown when perhaps most of those here present took their course of training. It is to the especial to this new branch of study an important place in the curriculum.

The very principle of constitutional government, or government by law in the interest of liberty, is always the shining mark of those who would destroy all government. The demagogue seizes upon the defects of the best institutions to breed distrust in all. It is true that democracy cannot live without respect for law, but it must be remembered that law in democracy will have only the respect it deserves. Adaptation according to democratic principle, the growth and development in which democratic progress consists, must ever be the concern of those who know how to distinguish between what is vital and what is merely incidental and temporary; it is those who can really help. Liberty is not to be saved by the lusty shoutings of the street; it needs the discipline and courage of the soldier, the probity and intelligence of the industrious and high-minded official, the undying love of a people instinct with patriotism, the song and the cheer and the ardor of the multitude, but beneath all these, and unescapable, is the constant working of economic forces with which we must reckon. The adjustment to preserve liberty requires the best training which special studies can furnish, and while all effort at progress under law must be inspired by the idealism of our people, it cannot be successful, at least without great losses through mistaken ventures, save by the service of experts. These are the guardians of the truth which cannot be found on the surface, but lies deep in the mine of thought and experience, requiring rare skill for its discovery and extraction. And it is the truth alone that can keep you free.

Harvard Law School Association

President, Oliver Wendell Holmes, LL.B.'66
Secretary, Frank W. Grinnell, LL.B.'98
60 State Street, Boston
Treasurer, Reginald Heber Smith, LL.B.'14
60 State Street, Boston

COUNCIL

Term Expires 1921

Irvin M. Garfield, LL.B., '96, Boston.
Frank F. Dresser, LL.B., '97, Worcester.
Frank W. Knowlton, LL.B., '02, Boston.

Term Expires 1922

Charles S. Rackemann, '81, Milton.
William G. Thompson, LL.B., '91, Newton.
George W. Wightman, LL.B., '15, Boston.

Term Expires 1923

Oliver Prescott, LL.B., '92, New Bedford.
Murray Seasongood, LL.B., '03, Cincinnati.
Henry L. Shattuck, LL.B., '04, Boston.

Term Expires 1924

Fred T. Field, LL.B., '03, Boston.
Francis G. Goodale, LL.B., '07, Weston.
Charles E. Hughes, Jr., LL.B., '12, New York.

THE objects of this Association are to advance the cause of legal education, to promote the interests and increase the usefulness of the Harvard Law School, and to promote mutual acquaintance and good-fellowship among all members of the Association.

All men who have attended the Harvard Law School for at least one year are eligible for membership.

During the past two years nearly five hundred men have joined the Association so that it now has approximately two thousand five hundred members. It should have three thousand members.

Any qualified person may become a life member for one payment of twenty-five dollars, or an annual member for a payment of three dollars the first year and two dollars each year thereafter. Checks should be sent to the treasurer.

All members of the Association are given copies of the Centennial History of the Harvard Law School.